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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-7861

COUNTY BOARD OF ARLINGTON COUNTY,

Petitioner,

v.

MARY ROSE GREENE GOD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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COUNTY BOARD OF ARINGTON COUNTY,

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MARY ROSE GREENE GOD,

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PETITION FOR A WRIT OF CERTIORARI

The petitioner prays that a writ of certiorari issue to review the decision of the Supreme Court of Virginia rendered on September 5, 1975, affirming a finding of the Circuit Court of Arlington County, Virginia, that the existing single-family zoning of two building lots in Arlington County, Virginia, was invalid and that the denial of a rezoning of the lots for an apartment house use was arbitrary and capricious.

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at 216 Va. ____, 217 S.E.2d 801 (1975). The opinion is appended to the petition in the appendix. That appendix page is 1a.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1257(3), Title 28, United States Code. It is well-settled that the injunction against the application of the Zoning Ordinance to respondent's land, and the decision that the ordinance was unconstitutional as applied, is drawing into question the validity of a "state statute" for the purposes of 28 U.S.C. § 1257(3). See, e.g., *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 94 S. Ct. 2291, 41 L. Ed.2d 132 (1974).

THE QUESTIONS PRESENTED FOR REVIEW

1. Does the decision of the Virginia Supreme Court discriminate in favor of the owner of the two building lots in Arlington County and against other persons in the neighborhood of the building lots and other persons residing in Arlington County and in that way violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does the decision of the Virginia Supreme Court which rules that existing single-family zoning of two

building lots in Arlington County was invalid misconstrue the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and in so doing invalidate a legitimate exercise of the police power of the State of Virginia which is being asserted by the County Board of Arlington County, Virginia?

STATUTES INVOLVED

1. Section 8 of the Arlington County, Virginia, Zoning Ordinance: "R-6" One Family Dwelling Districts. Although the provisions of this ordinance were not declared to be a violation of the Equal Protection Clause of the Fourteenth Amendment, the applicability of this section, which is set forth in the appendix at page 17a, to the land in question was at issue. This section incorporates by reference the following section.

2. Section 4 of the Arlington County, Virginia, Zoning Ordinance: "R-20" One Family Dwelling Districts. This section is set forth more fully in the appendix at pages 13a.

3. Section 14 of the Arlington County, Virginia, Zoning Ordinance: "RA6-15" Apartment Building Districts. This section is set forth in the appendix at pages 22a and incorporates Section 11 which refers back to the following primary section.

4. Section 11 of the Arlington County, Virginia, Zoning Ordinance: "RA14-26" Apartment Dwelling District, App. 19a.

5. The following sections of the Code of Virginia which are set forth in the appendix at pages 11a-13a.

Section 15.1-486; Section 15.1-488; Section 15.1-489; Section 15.1-490.

6. The Fourteenth Amendment to the United States Constitution, Section 1, which is set forth in the appendix at page 10a.

7. Article I, Section 11 of the Constitution of Virginia which is set forth in the appendix at page 10a.

STATEMENT OF THE CASE

The respondent and applicant for rezoning in this case, Mary Rose Greene God (hereafter, Miss Greene or the applicant), owns Lots 26 and 27 in the West Colonial Heights Subdivision of Arlington County. They are in the neighborhood referred to as North Highlands at the southern end of the Potomac Palisades and bounded by Lee Highway, Spout Run, George Washington Memorial Parkway and a local Arlington street named North Oak Street. Lot 26 contains 6,672 square feet and Lot 27 to the north of it contains 7,191 square feet. They have access to North Quinn Street on the west and are on an irregularly shaped block.[1] The lots are zoned R-6 (a

[1] An exhibit has been prepared which clearly represents Exhibit C-13 offered by Miss Greene in her case at the trial level. It is provided for the purpose of making this statement of fact more understandable. See Appendix page 25a. Since Miss Greene's exhibit does not show the zoning line in the neighborhood of the property, a second exhibit has been prepared by the County to show the zoning classification. It is the exhibit at appendix page 26a.

single-family residential zone - a minimum of 6,000 square feet required for each dwelling) and have been so zoned since 1950 when all of the property on the block north of the line which forms the southern border of Lot 26 was zoned R-6. At that time the comparatively small portion of the block south of the line was zoned RA6-15 (multi-family residential with a requirement of 600 square feet of lot for units of one room exclusive of kitchen and bath up to 1,500 square feet for each apartment with four or more rooms exclusive of kitchen and bath). Then from 1950 to 1954, the County Board rezoned much of the remainder of the block RA6-15. There was no evidence of any rezonings after 1954 and no evidence of any other rezonings in the North Highlands neighborhood after 1950. To the south of Miss Greene's property are two lots (numbered 24 and 25) which have been zoned RA6-15 since 1950 but which are each used for a single-family dwelling. Lot 28 is to the north of Miss Greene's property and Lot 29 is to the east of her property and those lots are both zoned and used as R-6 single-family property. Only the dwelling on Lot 29 separates the Greene property from property zoned and used under the RA6-15 zoning classification. The houses on Lots 24, 25, 28 and 29 are wood frame houses estimated to be about 50 years old at the time of the trial in 1974. The apartments on the block to the east of Lot 29 are brick garden apartments, two to three stories high and built in the early to middle fifties. Across Quinn Street from the applicant's property are the rear yards of four brick residences which face west on Rolfe Street. The trial judge estimated, based on his personal observation, that these four houses were 20

to 25 years old at the time of the trial. The southern two of those are on lots zoned RA8-18 (an apartment zoning category with slightly lower density than RA6-15). The other two are zoned R-6. South of the two lots zoned RA8-18 is property zoned and used as RA8-18 property. Quinn Street mounts a steep grade south of Miss Greene's property and has reached level ground in front of it.

The property in the surrounding neighborhood was designated "undetermined" on the Land Use Plan until February 21, 1973, when the land in the area of the applicant's property was designated residential low density or residential low medium density by unanimous action of the County Board. The dividing line between these categories follows the zoning line in the neighborhood of the Greene land, with her land in the residential low density (single-family) category.

Miss Greene bought the land in 1965 for approximately $23,000. Lot 26 had a dwelling house which she rented and later boarded up. Lot 27 has always been vacant. In January of 1968, she applied for a rezoning to RA8-18, then withdrew the application after a recommendation of denial by the County Manager and the County Planning Director. In 1971, the County Board adopted a Neighborhood Conservation Plan for the North Highlands neighborhood which had been recommended by the neighborhood citizens association which emphasized Land Use Plan recommendations. Those recommendations were for land use designations consistent with the existing zoning. It is this recommendation which included an exhibit, frequently complained of by Miss Greene, which had a mistake about existing apartment use of

some land on Rolfe Street zoned RA8-18. This mistake was not repeated at the time of the 1972 action on Miss Greene's application for rezoning nor at the time of the 1973 action on the land use designation.

Then in 1972, Miss Greene requested a rezoning to RA6-15. The County Planning staff recommended denial of the application as the Planning Commission also did by unanimous vote. At the hearing before the County Board on October 3, 1972, the County Board saw slides of the neighborhood, heard from a member of the Planning staff who summarized the contents of Exhibit D-7, heard from the Chairman of the Planning Commission, in opposition to the application, heard from the applicant's husband in support of the application, heard the representative of the Arlington County Civic Federation who spoke in opposition to the application, heard from a representative of the neighborhood civic association who spoke in opposition to the application, and then voted unanimously to deny the application. She then instituted this action.

At the trial, Miss Greene's husband testified that she would be restricted to building houses which would sell for $40,000 to $45,000 on each of the lots. He also testified to his interest in "houses that surround the North Highlands area, or surround other parts of Arlington County and land that we possibly could develop", and to his interest in buying Lots 28 and 29, the single-family lots next door to his wife's lots. Her expert witness testified to 18 reasons in support of his conclusion that the lots should be rezoned. These included his conclusions that it would not be economical to build two single-family

dwellings, that single-family dwellings would not achieve a satisfactory "lifestyle", and that townhouses would meet the different "lifestyles." He also testified that Lots 28 and 29 should be zoned the same way as Lots 26 and 27, and that all four lots (perhaps six including 24 and 25) should be used for a transitional zone between the apartment buildings and single-family residences. On Miss Greene's lots he proposed 10 or fewer units. The County Board disputes the contentions of Miss Greene's husband and of her expert witness.

Miss Greene disputes the County's evidence but that evidence was the evidence of the Citizen Services Planner, who explained the neighborhood conservation plan which had been relied upon in recommendations made to the County Board on the application. The Director of Utilities repeated the opinion that had been given to the County Board at the time of the application: "We are reaching the point now that on the existing layout in that area that with much more development we would put ourselves in a position of not being able to provide adequate service to domestic users and at this time our fire protection is rather weak." The Chief of the Planning and Zoning Section of the County government testified to his expert opinion that the single-family designation should be maintained to preserve the balance of uses and existing characteristics of the neighborhood and to his opinion of the desirability of the land for single-family development or other uses under the R-6 zoning classification.

In its written opinion, the Virginia Supreme Court said:

> "The two lots in question, together with two other lots in different ownership, are the remnants of a larger single-family district established in 1950 in a block now almost entirely zoned for and devoted to apartment uses, in an area of Arlington County dominated by garden-type apartment houses. The landowner showed that the construction of single-family residences on the lots in question would be economically unfeasible; that the existing zoning was unreasonable; and that her proposed use, the construction of 10 'townhouses of garden apartment style' under an appropriate classification, would be reasonable. Against this, only the opposition of a local civic association and the claim of a serious water problem, which proved to be nonexistent, suggested that the present zoning should be retained."

The County Board believes certain of these findings have no basis in the record in this case. First of all, in the first sentence quoted from the opinion, it is suggested that the single-family residential district was limited to the block on which the lots were located when the zoning was established in 1950. The record is clear and no dispute has ever been raised about the fact that this is a neighborhood including more than the block in question and divided between a garden apartment district closer to Lee Highway and a single-family district closer to the wooded area along the Potomac Palisades. (See Miss Greene's map, infra) On this first and narrow issue, it is only an implication of the Virginia Supreme Court that is disputed, but on the next issue, the County Board believes that the clear language used by the Virginia Supreme Court is in conflict with the record. This is the Virginia Supreme Court's finding that the area in

question is an area of Arlington County dominated by garden-type apartment houses. The trial court made no such finding, and such a finding was not even alleged by Miss Greene. The entire record as well as Miss Greene's exhibit on appendix page 25a show that there is no support for this finding of fact by the Virginia Supreme Court. Miss Greene's allegation, furthermore, was not that the construction of single-family residences on the lots would be economically unfeasible, but that she would be limited to building $40,000 to $45,000 houses on the lots. The Virginia Supreme Court's mistake in characterizing the County's evidence in opposition is even more serious. At no point in the record does the County place any reliance on opposition of a local civic association. The County Board's position was that the neighborhood conservation plan adopted the year before the zoning application and approved by the Planning Commission and the County Board was inconsistent with any such rezoning. Although the Virginia Supreme Court found that the claim of a serious water problem proved to be nonexistent, nowhere in the record is there any rebuttal of the opinion of the Chief of the Utilities Division of Arlington County that this neighborhood and one other neighborhood in Arlington County had the worst or the lowest quality of water service of any neighborhoods in Arlington County. Finally, the County's most important contention (a consideration given great weight by Miss Greene's own expert) was totally ignored by the Virginia Supreme Court as well as by the trial court. This was the opinion of the County's Planning expert that the preservation of these lots as single-family lots was highly important to

the maintenance of this area of Arlington County as an area in which single-family dwellings could be preserved and constructed. Furthermore, the civic or democratic opposition claimed that a rezoning of Miss Greene's lots would have amounted to an illegal "spot zoning" and the County Board has contended as a part of its case in both the trial court and the Supreme Court of Virginia that a granting of this application would have been an illegal spot zoning, and, accordingly, a denial of equal protection to the citizens of Arlington County other than the one landowner who would have been benefited by it.

REASONS FOR GRANTING A WRIT OF CERTIORARI

A. THE VIRGINIA SUPREME COURT HAS RENDERED A DECISION WHICH CONSTITUTES A DENIAL OF EQUAL PROTECTION TO THE RESIDENTS OF AN ARLINGTON NEIGHBORHOOD.

The County's first contention is that the Virginia Supreme Court rendered a decision in conflict with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The County argues that there are two independent grounds for concluding that the decision of the Virginia Supreme Court is in conflict with the United States Constitution. The first of those independent grounds is that fact that the result reached by the Virginia Supreme Court has the effect of granting to Miss Greene an illegal spot zoning which gives her greater

rights to use her land than other persons similarly situated without there being any rational basis for that discrimination in favor of Miss Greene. The second of those independent grounds for finding the decision of the Virginia Supreme Court in conflict with the United States Constitution has to do with the relief provided to Miss Greene. In effect, the Virginia Supreme Court will allow Miss Greene to use her land as part of a specially created judicial zone. This specially created judicial zone is improper because the Virginia Supreme Court did not have a valid basis for overruling the action of the Arlington County Board in placing and leaving Miss Greene's property in a single-family zone. The County concedes that this second independent basis for finding the Virginia Supreme Court's decision a violation of the Equal Protection clause is interrelated with the second question presented for review. What the County is saying is that when a state court misconstrues the Equal Protection clause of the United States Constitution by overruling a valid legislative act regulating the use of land and then creates a judicial right to use land which confers a special privilege on a single person or a limited class of persons, then in that case the state court is itself engaging in an invalid legislative act which denies to the citizens of the community affected the equal protection of the laws guaranteed to them by the Fourteenth Amendment.[2]

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[2]The County Board has standing to assert that the decision and order of the Virginia Supreme Court is illegal spot zoning. This is not merely a case of a local government acting as the representative of its residents [see footnote 23, *Baker v. Carr*,

This fashioning of a judicial remedy which denies to persons the equal protection of the laws is what was invalidated by the case of *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836 (1948). Under the circumstances which exist here, an argument that the decision of the Virginia court results in a denial of equal protection is much less novel than such a decision was in the case of *Shelley v. Kraemer, supra.* In *Shelley v. Kraemer*, the Missouri court had merely enforced a covenant to which private parties had obligated themselves but here the Virginia Supreme Court has reached a result which would have been forbidden to a legislature by engaging in an act of illegal spot zoning. Viewed from another perspective, the Virginia Supreme Court has erroneously overruled a valid legislative act and in fashioning a remedy based on that erroneous overruling, it has created circumstances which are themselves, or which by themselves create, a denial of equal protection of the laws to every member of the community except the person who sought to benefit from a special privilege conferred by the Virginia judiciary.

Clearly, the first independent grounds on which this analysis rests requires a finding that the action of the

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369 U.S. 186, 204, 82 S. Ct. 691, 703 (1962)]. Here the Board is being: (1) enjoined from enforcing its own ordinances, and thus unable to perform its governmental functions, and (2) being ordered to take affirmative acts which are in violation of the Fourteenth Amendment. Were the County Board to comply with such an order, the Board members would be violating their oath to uphold the Constitution, and would be subjecting themselves and the County to suit by the neighborhood residents.

Virginia Supreme Court constitutes an illegal spot zoning and that an illegal spot zoning is a violation of the Equal Protection clause of the Fourteenth Amendment. Miss Greene's two lots are near the border between a single-family residential district and a multi-family residential district. In fact, one of the lot lines of one of the two lots is the border between the two districts although in fact that lot line is not a border between different actual uses. The land zoned for multi-family uses on which Miss Greene's lot borders is still actively used for single-family residences. Accordingly, Miss Greene's land is similarly situated to numerous other parcels of land zoned for single-family uses and located in the neighborhood in question. Since it is so similarly situated, there must be a rational basis for distinguishing between Miss Greene's land and all other land zoned for single-family dwelling uses which is similarly situated. The only fact actually cited by the Virginia Supreme Court as providing a rational basis for its de facto rezoning of Miss Greene's land is the Virginia Supreme Court's conclusion that the construction of single-family residences on the lots in question would be economically unfeasible. Miss Greene's evidence was that she would be restricted to building $40,000 to $45,000 houses on the lots, not that to do so was economically unfeasible. Furthermore, she bought the lots in 1965 when they were zoned and used for single-family purposes and even at the time of the trial her husband expressed a strong interest in buying the adjacent single-family lots. No finding of economic infeasibility was made by the trial judge in his

memorandum opinion and the finding by the Virginia Supreme Court is without any factual basis in the record. The objective result of the Virginia Court's opinion is to serve a private economic interest and nothing else, and this is a purpose which has been found improper as a basis for rezoning. It is commonly referred to as illegal spot zoning. The highest courts of numerous states have passed on the question of illegal spot zoning. See, e.g., *Herman v. City of Des Moines*, 250 Iowa 1281, 97 N.W.2d 893 (1959); *Hunt v. City of San Antonio*, 462 S.W.2d 536 (Texas 1971) (This was one of the cases on spot zoning cited to the court below.); *Page v. City of Portland*, 178 Ore. 632, 165 P.2d 280 (1946); and *Kozesnik v. Township of Montgomery*, 24 N.J. 154, 131 A.2d 1 (1957). No evidence of the other party, no finding of the trial court, and no finding of the Virginia Supreme Court is based on any allegation or conclusion that the rezoning of Miss Greene's land will serve any public interest or any other interest than her private interest. The characteristic test for determining whether a zoning ordinance constitutes illegal spot zoning is as follows:

> "If the purpose of a zoning ordinance is solely to serve the private interests of one or more landowners, the ordinance represents an arbitrary and capricious exercise of legislative power, constituting illegal spot zoning; but if the legislative purpose is to further the welfare of the entire county or city as a part of an overall zoning plan the ordinance does not constitute illegal spot zoning even though private interests are simultaneously benefited." *Kozesnik v. Township of Montgomery*, 24 N.J. 154, 173, 131 A.2d 1, 11 (1957).

This was quoted with approval in *Wilhelm v. Morgan*, 208 Va. 398, 403, 157 S.E.2d 920,924 (1967). It is difficult to dispute that the Virginia Supreme Court has violated this rule by changing land use regulations with respect to a particular piece of property and not providing or having any basis for that change which is part of an overall zoning plan or which serves any aspect of the health, safety, welfare or good order of the community. Clearly, it serves Miss Greene's private interests to have more discretion in the use of her land than do other persons in Arlington County who are similarly situated.

The second independent basis for the conclusion that the judicial privilege accorded to Miss Greene is a denial of the equal protection of the laws to other persons may be amplified as follows. This ground, however, is interrelated with the reasoning which lies behind the County's argument on the second question presented for review. This position is that even if the rezoning or judicial change in land use regulations is not equivalent to an illegal spot zoning and in that way a denial of the equal protection of the laws, then it is still a denial of the equal protection of the laws with respect to other citizens in Arlington County if it follows upon a misconstruction of the Fourteenth Amendment by the Virginia Supreme Court and a resulting favoritism to one landowner as a result of that misinterpretation. This favoritism has notably lasting effects where the action is one of applying land use regulations. In the case of most legislation, a misconstruction of the Equal Protection Clause of the Fourteenth Amendment as it is applied to a single person in one particular case would not have such a long range effect. If, for example, a state supreme

court improperly applied the Fourteenth Amendment to invalidate a tax on a particular person and in so doing denied the equal protection of the laws to other persons, the issue could be raised again at the time of the next levy. However, in the peculiar case of the legislative act of subjecting a particular piece of land to zoning regulations, a permanency attaches to the subjection of that land to those regulations which is unique, and which means that the use of the land in violation of the Equal Protection Clause is a continuing violation of the rights of others. The other persons in the community affected by the Virginia Supreme Court's change in the land use regulations are without a guide to the standards being applied by that court in any instance that it chooses to judicially rezone land to serve private interests.

B. THE VIRGINIA SUPREME COURT HAS MISCONSTRUED THE EQUAL PROTECTION CLAUSE.

The second question presented for review is the question raised by the contention of the County that the Virginia Supreme Court has misconstrued the Equal Protection Clause of the Fourteenth Amendment and erroneously found the action of the Arlington County Board unreasonable. The County believes that the Virginia Supreme Court has, in effect, applied the strict scrutiny test to the rezoning action by the Arlington County Board and, without stating so, required that County Board to show a compelling governmental interest for its action. The only clue to the basis for the Virginia Supreme Court's decision in this case is the following language:

> "Under the circumstances of this case, the denial of the rezoning application was discriminatory, and, therefore, arbitrary and capricious."

The Virginia Supreme Court has made clear that where it refers to a legislative zoning action as discriminatory, it means to declare that such action constitutes a denial of equal protection of the laws. In *Board of Supervisors of James City County v. Rowe*, 216 Va. ____, 216 S.E.2d 199, 210 (1975), the Virginia Supreme Court said:

> "When a land use permitted to one landowner is restricted to another similarly situated, the restriction is discriminatory, and, if not substantially related to the public health, safety or welfare, constitutes a denial of equal protection of the laws."

The Virginia Constitution has no equal protection clause but merely defines certain classes of prohibited governmental discrimination. See Virginia Constitution, Article I, Section 11, in the appendix at page 10a. It is indisputable then that the only basis for the Virginia Supreme Court's decision is a basis which must be found in the Equal Protection clause of the Fourteenth Amendment. Whether the question is one of equal protection or of special legislation, the test for determining validity under the Equal Protection clause appears to be the same. In certain cases where a suspect classification (e.g., race, creed, etc.) or a fundamental right (e.g., freedom of religion, freedom to travel, etc.) is involved, laws and ordinances have been subjected to strict scrutiny by this Court and by other courts in the United States applying the principles formulated by this Court, and a requirement of a showing of a compelling state interest is

necessary to sustain the validity of any such classification. *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 89 S. Ct. 1404 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 89 S. Ct. 1079 (1966); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963). The reason for subjecting statutes and ordinances to strict scrutiny in such cases is that traditional political processes have broken down. See footnote 14, *Johnson v. Robison*, 415 U.S. 361, 375-76, 94 S. Ct. 1160, 1169-70 (1974). However, in cases where traditional political processes have not broken down, where no suspect classification or fundamental right is involved, a classification will be sustained if it is not unreasonable or arbitrary and if it rests upon some ground of difference having a fair and substantial relationship to the object of the legislation, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974); *Johnson v. Robison, supra; Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251 (1971); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926). Customarily, it is understood that it is not for the courts to reappraise the judgment of the legislature:

> "When the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 102 (1954).

Since property owners and land developers are not a suspect classification, the burden was on Miss Greene to prove by clear and convincing evidence that the denial of the rezoning had no reasonable relationship to the maintenance of such premissible community interests as "a quiet place where yards are

wide, people few, . . .[and] a sanctuary for people." *Village of Belle Terre v. Boraas, supra*, at 9, 94 S. Ct. at 1514. Cf. *Berman v. Parker, supra; Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir., 1974). The court here has failed to consider the expert testimony of the planner for the County summarizing the reasons for maintaining the existing low-density residential use regulations for Miss Greene's land:

> "The existing zoning boundary which is reflected in the property being surrounded on three sides by single-family use and zoning; the land use not denying the zoning, but the land use as single-family on the remaining side of the property; the general character of the neighborhood; the balance of uses which the staff felt at the time should be preserved; the location of the property [on] the local street versus a collector [or] main thoroughfare; and in 1972, the general support of a neighborhood plan which indicated the preservation of the balance of uses and the existing zoning use."

This same expert also testified:

> "I think that the preservation of those single families in that quadrant are very important to the continuing stability and retention of single-family use on the remaining quadrants of that intersection."

These considerations should be unavoidable conclusions for any person applying prevailing standards of equal protection to legislative acts. Experience teaches most persons that whenever there is a line which has been drawn under circumstances which cannot avoid a degree of arbitrariness, then when that line is upset, the community will be far less likely to rely on an

expectation that the newly-established line will be continued. A quick look at the exhibit on appendix page 25a will show that the land between Quinn and Rolfe south of 21st Road as well as the land east of Queen Street between 21st Road and 22nd Street may be subject to rezoning by the Virginia courts at any time if the County may not rely on its intention to maintain a family residential district as a basis for imposing single-family use restrictions. This case demonstrates now that, in the application of the Equal Protection clause, Virginia, unlike any other jurisdiction in the United States which has considered the issue, gives no weight to the desire of a locality to protect the integrity and character of neighborhoods. The protection of single-family neighborhoods against the encroachment of multi-family apartment buildings has been an approved purpose of zoning ordinances since the earliest cases approving land use regulations. *Village of Euclid v. Ambler Realty Co., supra*, 272 U.S. at 394, 47 S. Ct. at 120. This has been the rule throughout the United States. *Herman v. City of Des Moines, supra; Page v. City of Portland, supra,* and *Hunt v. City of San Antonio, supra*. Unless the Fourteenth Amendment is to be applied differently in Virginia than in any other American state, a review by this Court of the standard which is being applied by the Virginia Supreme Court is necessary.

CONCLUSION

The Virginia Supreme Court in this case is applying the Equal Protection clause of the Fourteenth

Amendment to the United States Constitution in a manner which has been condemned by this Court. Its highest court has distinguished Virginia from other states in setting the standard for the burden of proof of rebuttal evidence in zoning cases, the weight and relevancy to be accorded claims respecting the effect of market value on rezoning actions, the burden of proof to be employed to determine changed conditions, and, most importantly, the rights of neighboring property owners and the interest of the community in maintaining single-family residential districts. All this has been done by the court which is purportedly applying the Equal Protection clause of the Fourteenth Amendment. The County Board believes that it is fair to characterize the result reached by the Virginia Supreme Court as comparable to the results reached by those American courts which have in the past applied a view of "natural law" not expressed in the written constitution being interpreted in order to invalidate the acts of legislatures. While a review of cases like this could have the short-range effect of increasing the number of cases brought before this Court, for the long-range it is important for this Court to speak clearly on misuses of the Equal Protection Clause by State courts in order to take early action to prevent a future circumstance under which this Court and the entire American Judiciary could become deeply embroiled in re-appraisals of legislative judgments.

More importantly, the Virginia Supreme Court, ostensibly relying on the Equal Protection clause, is in fact engaging in an action which offends that clause, and should be condemned by this Court. In its zeal to perform a legislative function, the Virginia Supreme

Court has itself violated the Equal Protection clause by performing a de facto illegal spot zoning. Unless this error is corrected, Arlington County, and all of Virginia, may be filled with judiciary zones which will discriminate against the overwhelming majority of citizens.

A petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Present: All the Justices.

COUNTY BOARD OF
ARLINGTON COUNTY PER CURIAM

-v- Record No. 740803

Richmond, Virginia, September 5, 1975

MARY ROSE GREENE GOD

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY

Paul D. Brown, Judge

This is a zoning case in which the County Board of Arlington County denied the application of the landowner, Mary Rose Greene God, for rezoning from single-family residential district (R-6) to apartment house district (RA6-15) of two adjoining lots in the northern portion of the county. Upon the landowner's motion for declaratory judgment, the trial court found that the existing zoning was unreasonable, and therefore invalid, and that the denial of the rezoning was arbitrary and capricious. In its final order, the court placed the land in the zoning classification sought by the landowner.

While the appeal awarded in this case brings under review the trial court's holding that the rezoning denial was arbitrary and capricious, the principal reason we awarded the appeal was to examine the court's action in actually rezoning the land. In light of our recent

decision in the *Randall, Allman,* and *Williams* cases,[1] all handed down after the date of final judgment in the present case, we are constrained to affirm, in summary fashion, the trial court's finding of arbitrariness and capriciousness and to reverse, in similar fashion, the court's action in rezoning the land.

First, with respect to the holding that the rezoning denial was arbitrary and capricious, the evidence fully sustains the trial court's conclusion. The two lots in question, together with two other lots in different ownership, are the remanants of a larger single-family residential district established in 1950 in a block now almost entirely zoned for and devoted to apartment uses, in an area of Arlington County dominated by garden-type apartment houses. The landowner showed that the construction of single-family residences on the lots in question would be economically unfeasible; that the existing zoning was unreasonable; and that her proposed use, the construction of 10 "townhouses of garden apartment style" under an appropriate zoning classification, would be reasonable. Against this, only the opposition of a local civic association and the claim of a serious water problem, which proved to be non-existent, suggested that the present zoning should be retained.

The landowner's evidence was sufficient to overcome the presumed legislative validity of the Board's action

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[1] *City of Richmond v. Randall*, 215 Va. 506, 211 S.E.2d 56 (1975), *Board of Supervisors of Fairfax County v. Allman*, 215 Va. 434, 211 S.E.2d 48 (1975), and *Board of Supervisors of Fairfax County v. Williams*, Va. , S.E.2d (1975).

and to show that the denial was unreasonable. The Board, however, in its turn, failed to produce evidence sufficient to show that the denial was reasonable. The question, then, was not fairly debatable. *See City of Richmond v. Randall, supra*, 215 Va. at 511, 211 S.E.2d at 60. Under the circumstances of this case, the denial of the rezoning application was discriminatory and, therefore, arbitrary and capricious. *See Board of Supervisors of Fairfax County v. Allman, supra*, 215 Va. at 445, 211 S.E.2d at 55.

With respect to the trial court's action in actually rezoning the lots in question, the landowner, in light of *Allman*, concedes that the court "did not have the right ... to simply rezone the land." The landowner also concedes that under the evidence before the trial court there are, in addition to the RA6-15 apartment classification she sought, other multiple-unit zoning categories which would permit her proposed use. The landowner agrees, therefore, that the case must be remanded for further consideration by the Board, at the direction of the trial court, of an appropriate multiple-unit zoning classification for her property.

Accordingly, we affirm the trial court's findings that the existing single-family zoning of the lots in question is invalid and that the Board's denial of rezoning was arbitrary and capricious. We reverse the action of the court in actually rezoning the land. The case will be remanded to the trial court with instructions to enter another order. The new order will suspend the adjudication of invalidity for a prescribed period of time and direct the Board to consider further legislative action. Because the evidence shows that the apartment-

house use proposed by the landowner is reasonable,[2] the new order will enjoin the Board during the prescribed period from taking any action which would disallow such use. The new order will further provide that should the Board fail to take appropriate action within the prescribed period, the adjudication of invalidity will become operative and the injunction will become permanent, provided that the landowner shall not put her property to any uses other than those shown by the record to be reasonable.

Affirmed in part, reversed in part, and remanded.

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[2] In light of the landowner's concession that other multiple-unit zoning categories would permit her proposed use, the Board, following remand, will be free to consider such other categories in addition to the RA6-15 zoning sought by the landowner.

OFFICE OF THE COUNTY ATTORNEY
ARLINGTON, VIRGINIA
REC'D.
MAY 22 1974
A.M.
(stamp)

VIRGINIA:

IN THE
CIRCUIT COURT OF ARLINGTON COUNTY

MARY ROSE GREENE GOD Complainant	)	
v.	)	In Chancery No. 22849
THE COUNTY BOARD OF ARLINGTON, et al, Defendants	)	

MEMORANDUM

I am of the opinion that on the facts as they relate to this particular property, namely lots 26 and 27, they take the issue of the County Board's denial of rezoning out of the fairly debatable category and do make it, in those strong words, "arbitrary and capricious." That is my finding and here is why.

Originally, this piece of ground and the zoning line which ran down the middle of the block between 21st Street and 21st Road were to be viewed differently than today.

When RA-615 was first established, you had not only a straight line, but a mid block line. Now that has

changed, and in the successive zonings, it has marched up filling the block on the 21st Road side. See Photograph C-14 and successive overlays.

The buildings, which were then perhaps 35 or 36 years old, are now, by the testimony some 60 years old. Take the subject property and go around it: On the south side, there is the same apartment zoning sought. It is contiguous, even though the use is for two old houses, on Lots 24 and 25.* And they are old and while the building on Lot 25 is suggested to have a temporary flaky paint problem, there is really a serious problem of age on the house.

When you look diagonally across the street (West) from the subject property, you can see the two RA 8 to 18 apartments, two four-unit buildings never shown as apartments on the Exhibit D-1, the neighborhood conservation plan. They were always shown as residential, indicating a mistake in concept when that plan was endorsed in principle. It was a mistake as to what was existing.

Directly across from Lot 26 is the house pictured in C-8. The angle of the picture is a little different but the property, while a residence, is part of RA 8 to 18 zoning across the street. So you have across from Lot 26, part of the land zoned RA 8 to 18. Thus there is apartment zoning on the south side and to the west apartment zoning opposite a portion, perhaps 30 percent of the two lots. You do have a less intense apartment zoning across the street.

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*See Exhibit D-8A upon which the Court has superimposed the lot numbers shown on Exhibit C-16.

As shown in picture C-9, to the west you have two residences, brick, newer – just an estimate would say they are probably in the 20 to 25 year range. They are good, solid houses, well-built and so on, and are across from a little part of the subject lot 26 and all of 27.

Lot 28 is one of the now definitely older houses; well-painted, neat, trim, but clearly in the category Mr. God testified to, the 60 year age. North of Lot 28 is the rear of other properties. See D7e, D7f and D7g.

You go down 21st Road North. As I walked it on the view and looked down the narrow entrance to Lot 29, the second Inscoe property – and it, too, is well maintained but is an older property, and the slides don't show it too well, but print D7g and slide D7h are absolutely adjacent. Lot 29 has a three-story Fort Bennett unit kind of peering down on it. It might not be Fort Bennett, but it's in the same zoning category and has the general look of the Fort Bennett Apartments.

Now the particular property is (and I'm not ready to say that the zoning line must be only in the middle of the block or only on a street, for that would be too rigid a view) sort of an orphan property in terms of the just general use of land.

It does not appear to have any special suitability as residential, noting the age of the properties around it and the apartment zonings around it. On its south side it faces the back yards of the attendant trash cans and normal things that go with back yards of what is still an apartment zoning, the back yards are right there.

The approach to this property is up an extremely steep hill, not an attractive entrance. Granted, once you're up on top, it is level ground and pretty nice.

There are the backs of the apartments already referred to, shown in C-10, and the quantities of trash they produce out near the street. There are the backs of all the other houses on the west side of Quinn Street, including the two newer brick ones.

At the corner of Quinn and 21st Road the houses back to the subject premises. The two neighbors' Inscoe on Lots 28 and 29 have houses sideways to this one. On 21st Road North there are what were described as cottage-type houses. They must have been the suburban replacement for a barn. See D7e.

Now none of these observations are to deny the niceties and the charm of well-kept older houses. There is a distinction between those of a particular historical mode and those that are cottage types. The latter eventually get replaced – not restored as historical landmarks.

All of these things leave this property, as I say, an orphan for development. It would be much easier to say the evidence is absolutely overwhelming if Lot 29 were RA 6 to 15. But it is all of a 40 foot lot and the same apartments are already breathing down on this immediate property.

Now there is change since the original zoning. There is not only the property rezoning moving up the street. There is the increase in age of the buildings surrounding this property. The development of the two brick houses shown on picture C-9, which are west of this property, put their backsides to this place, so most everything has got its backside to it. All of these things leave the subject property marooned. Add to this not a major, but nevertheless a misunderstanding in the neighborhood conservation plan in not showing the two four-unit apartment buildings in the RA 8 to 18, when

they were right there and diagonally across the street from this property.

Other neighborhood conditions are considered. At the time of the request for zoning there existed the plan for a thoroughfare (subsequently abandoned) only a block away. On two sides it was only a block away from this property. This has been a changing area. There have been acquisitions for Route 66 down on Lee Highway. The uses were obviously the subject of much debate because the Board couldn't decide on them for a long time, and left the uses open.

But when the true light is cast on the facts, then it makes the result of the vote arbitrary. The Board members may not be personally arbitrary, but the result of the rezoning vote is.

It sounds like the Court is being critical of some individuals. It is not. It's the judging of a result. Was the result arbitrary on all the facts?

The sum total of all these things requires a finding for the Complainant.

/s/ Paul D. Brown
Judge

Given: 5/21/74

United States Constitution:

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Virginia: Article I.

§11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases. – That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any

other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

Relevant sections, Virginia Code Annotated:

§15.1-486. Zoning ordinances generally; jurisdiction of counties and municipalities respectively. – The governing body of any county or municipality may, by ordinance, classify the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and size as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses;

(b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;

(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used;

(d) The excavation or mining of soil or other natural resources.

(e) [Repealed.]

For the purpose of zoning, the governing body of a county shall have jurisdiction over all the unincorpo-

rated territory in the county, and the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality. (Code 1950, § § 15-819, 15-844; Code 1950 (Suppl.), § 15-968; 1962, c.407; 1966, c.344; 1969, Ex. Sess., c.1; 1972, c. 789; 1975, c.641.)

§15.1-488. Regulations to be uniform. – All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts. (Code 1950, § § 15-820, 15-845; Code 1950 (Suppl.), § 15-968.2; 1962, c.407.)

§15.1-489. Purpose of zoning ordinances. – Zoning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of further accomplishing the objectives of § 15.1-427. To these ends, such ordinances shall be designed (1) to provide for adequate light, air, convenience of access, and safety from fire, flood and other dangers; (2) to reduce or prevent congestion in the public streets; (3) to facilitate the creation of a convenient, attractive and harmonious community; (4) to facilitate the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements; (5) to protect against destruction of or encroachment upon historic areas; (6) to protect against one or more of the following overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life,

health, or property from fire, flood, panic or other dangers; and (7) to encourage economic development activities that provide desirable employment and enlarge the tax base. (Code 1950, 15-821; Code 1950 (Suppl.), § 15-968.3; 1962, c.407; 1966, c.344; 1968, c.407; 1975, c.641.)

§15.1-490. Matters to be considered in drawing zoning ordinances and districts. – Zoning ordinances and districts shall be drawn with reasonable consideration for the existing use and character of property, the existing land use plan, the suitability of property for various uses, the trends of growth or change, the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, and the requirements for housing, schools, parks, playgrounds, recreation areas, and other public services; for the conservation of natural resources; and preservation of flood planes [plains] and for the conservation of properties and their values and the encouragement of the most appropriate use of land throughout the county or municipality. (Code 1950, § 15-821; Code 1950 (Suppl.), § 15-968.4; 1962, c.407; 1966, c.344; c.526.)

Zoning Ordinance of Arlington County:

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SECTION 4. "R-20" ONE-FAMILY DWELLING DISTRICTS.

The following regulations shall apply in all "R-20" Districts.

NOTE: For supplemental regulations, see Section 27, "Special Provisions."

A. USES PERMITTED:

1. One-family dwelling.

2. Farming, dairy-farming, livestock and poultry raising, and all uses commonly classed as agricultural, with no restrictions as to the operation of such vehicles or machinery as are incident to such uses, and with no restructions [sic] as to the sale or marketing of products raised on the premises; provided, that any building, structure or yard for the raising, housing or sale of livestock or poultry shall be located no less than one-hundred feet from any street or lot line; provided further, that poultry shall be kept in approved enclosures and shall not be allowed to roam at large.

3. Churches and other places of worship, including parish houses and Sunday Schools, but excluding rescue missions or temporary revivals.

4. Transitional uses: The following uses shall be permitted on a transitional-site in the "R-20" Districts:

a. The principal office of a physician, surgeon or dentist, provided such use is conducted within a dwelling and the residential character of such dwelling is not changed.

b. Public parking area if a use permit is secured, as provided for in Section 32, and said area is located and developed, as required in Section 29, herein.

5. Conditional uses: The following uses may also be permitted, subject to securing a use permit secured as provided for in Section 32, "Use Permits":

a. Schools, private, elementary, junior and senior high, kindergartens and day nurseries.

b. Public libraries, museums, and art galleries.

c. Clubs and grounds for games or sports, including community-swimming pools; provided any such use is not operated primarily for commercial gain, or for which any mechanical-amusement equipment is operated incidental to such games or sports.

d. Publicly-operated recreation buildings, playgrounds, parks, and athletic fields.

e. Community-buildings.

f. Hospitals or sanitariums; except animal hospitals, clinics, and hospitals or sanitariums for contagious, mental, or drug, or liquor addict cases, provided, that any building so used shall be set back not less than one hundred feet from any lot line or street line.

g. Institutional homes and institutions of an educational or philanthropic nature; except those of a correctional nature, or for mental cases.

h. Public utilities and services; such as railroad, trolley, bus, air, or boat passenger stations; railroad offices, right-of-way, and tracks (but excluding car-barns, garages, railroad-yards, sidings and shops); static transformer stations, transmission-lines and towers, commercial and public-utility radio towers, telephone exchanges (but excluding service and storage yards); provided, however, that the exterior appearance of any building permitted under this paragraph shall be in keeping with the character of the neighborhood in which it is located.

i. Private clubs, lodges, fraternities, sororities and dormitories; provided any such use is not operated primarily for commercial gain.

j. Buildings used exclusively by the Federal and State Governments, for public purposes; except penal and correctional institutions.

k. Airports and aircraft-landing fields; cemeteries, and golf courses (except driving-tees and miniature-courses).

l. Parking of a commercial vehicle, in cases working a grave hardship on the resident.

6. Uses, customarily incident to any of the above uses; including home occupation, such as the home office of a physician, surgeon, dentist, minister of religion, or other persons authorized by law to practice medicine or healing; also the home office of resident members of recognized professions (does not include real estate offices) and antique dealers; provided, that: (a) such use is situated in the same dwelling as the home of the occupant; and (b) such use does not occupy more than twenty-five percent of the livable floor area of the building, exclusive of the basement.

7. Accessory buildings, including a private garage, provided that a detached accessory building shall be located as required in Section 29, herein.

8. Name plates and signs as provided for in Section 30.

9. Automobile parking space to be provided as required in Section 29.

B. HEIGHT LIMIT:

No building nor the enlargement of any building shall be hereafter erected to exceed 35 feet.

C. AREA REQUIREMENTS:

1. LOT AREA: Every lot shall have a minimum average width of one hundred feet and a minimum area of twenty thousand square feet. The minimum lot area per dwelling unit shall also be twenty thousand square feet; provided, that where a lot has less width and less area than required in this subsection and was recorded under one ownership at the time of the adoption of this ordinance, such lot may be occupied by any use permitted in this section.

(end of Section 4)

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SECTION 8. "R-6" ONE-FAMILY DWELLING DISTRICTS.

The following regulations shall apply in all "R-6" Districts:

NOTE: For supplemental regulations, see Section 27.

A. USES PERMITTED:

1. All uses permitted in the "R-8" Districts with automobile parking space as required.

2. Transitional uses: The following uses shall be permitted on a transitional site in the "R-6" Districts:

a. Two-family dwellings adjacent to other than "C-1" and "C-1-O" Districts if a use permit is secured as provided in Section 9, "R-5" Districts.

b. With Site Plan approval as specified in Section 32, offices of doctors, physicians, dentists or psychologists, and medical or dental clinics, provided that the basis for judging the merits of any given site plan shall be the degree to which the structure has the appearance of, and complies with the bulk and placement requirements for, a single-family residence.

c. Public parking area if a use permit is secured as provided for in Section 32 and said area is located and developed as required in Section 29.

B. HEIGHT LIMIT:

Same as specified for "R-20" Districts.

C. AREA REQUIREMENTS:

1. LOT AREA: Every lot shall have a minimum average width of sixty feet and a minimum area of six thousand square feet. The minimum lot area per dwelling unit shall also be six thousand square feet; provided, that where a lot has less width and less area than required in this subsection and was recorded under one ownership at the time of the adoption of this ordinance, such lot may be occupied by any use permitted in this section.

(end of Section 8)

SECTION 11. "RA14-26" APARTMENT DWELLING DISTRICTS.

The following regulations shall apply in all "RA14-26" Districts:

NOTE: For supplemental regulations, see Section 27.

A. USES PERMITTED:

1. All uses permitted in "R-5" Districts.

2. Apartment houses, not exceeding six hundred lineal feet measured around the total perimeter of the exterior wall.

3. Uses customarily incident to any of the above uses including home occupation, such as home office of a physician, surgeon, dentist, minister of religion or other person authorized by law to practice medicine or healing; also the home office of resident members of recognized professions (does not include real estate office) provided, that (a) such use is situated in the same dwelling unit as the home of the occupant, and (b) such use does not occupy more than twenty-five per cent of the livable floor area of the said dwelling unit exclusive of the basement.

4. Principal offices of physicians, surgeons or dentists in existing apartment houses or residences converted to such office use or in new buildings designed for such office use; provided, that all such new buildings shall have the exterior appearance of apartment buildings;

and provided further, that all such uses shall be subject to the securing of a use permit therefor as provided in Section 32.

5. Accessory buildings, including a private garage, provided that a detached accessory building shall be located as required in Section 28.

6. Name plates and signs as provided for in Section 30.

7. Automobile parking space to be provided as required in Section 29.

8. Transitional Uses: The following shall be permitted on transitional sites which abuts "C-2", "C-3", "CM" or "M" Districts.

a. With site plan approval, offices of physicians, surgeons, dentists, or psychologists, and medical or dental clinics, provided that principal basis for judging the merits of any given site plan shall be (1) the degree to which the proposed development complies with the bulk, placement and coverage requirements of and has the appearance of an apartment building permitted in the apartment classification in which it is located, (2) the compatibility of the proposed development with existing and anticipated uses in the general neighborhood and (3) compliance with adopted plans for the development of the area.

B. HEIGHT LIMIT:

No building nor the enlargement of any building shall be hereafter erected to exceed either two and one-half stories or twenty-five (25) feet; provided, however, that

no dwelling unit shall be located more than one story above the entrance to said unit; and further provided that in large-scale housing projects having a site area of five (5) acres or more, dwellings may be erected to a height not to exceed either six (6) stories or sixty (60) feet but no less than five (5) stories, provided said dwellings are located not nearer than one hundred fifty (150) feet to any boundary line of the site on which the project is situated.

C. AREA REQUIREMENTS:

1. LOT AREA: Same as for "R2-7" Districts, provided that for apartment houses every lot shall have a minimum average width of seventy-five feet and a minimum area of seventy five hundred square feet. The minimum lot area per dwelling unit for apartment houses, including resident employees' dwelling units, shall be as follows:

Apartment Type	No. of Rooms	Lot Area Required Per Dwelling Unit
1	1	1400 Sq. Ft.
2	2	1800 Sq. Ft.
3	3	2200 Sq. Ft.
4	4 or more	2600 Sq. Ft.

The apartment type is determined by the number of rooms in each dwelling unit, as shown in the table above. Rooms containing bath and/or kitchen facilities are not included in the room count used in the apartment type determination.

Any floor space exceeding forty square feet, enclosed by partitions or walls having a door or other opening

for access shall be deemed to be a room. The use of all rooms shall be clearly defined on the plans submitted with the application for a building permit.

Where a lot has less width and less area than required in this subsection and was recorded under one ownership at the time of the adoption of this ordinance, such lot, if it has an area of 7,000 square feet or more, may be occupied by a two-family dwelling, if a use permit is secured as provided in Section 32, and if such lot has an area of less than 7,000 square feet, it may be occupied by a one-family dwelling.

(end of Section 11)

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SECTION 14. "RA6-15" APARTMENT DWELLING DISTRICTS.

The following regulations shall apply in all "RA6-15" Districts:

NOTE: For supplemental regulations, see Section 27.

A. USES PERMITTED:

1. All uses permitted in the "RA8-18" Districts.
2. Uses customarily incident to any of the above uses including home occupation, such as the home office of a physician, surgeon, dentist, minister of religion, or other person authorized by law to practice

medicine or healing; also the home office of resident members of recognized professions (does not include real estate offices); provided that (a) such use is situated in the same dwelling unit as the home of the occupant, and (b) such use does not occupy more than twenty-five per cent of the livable floor area of the building, exclusive of the basement.

3. Accessory buildings, including a private garage, provided that a detached accessory building shall be located as required in Section 28.

4. Name plates and signs as provided for in Section 30.

5. Automobile parking space to be provided as required in Section 29.

6. With a Use Permit convenience service areas as provided in Section 32*.

B. HEIGHT LIMIT:

No building, nor the enlargement of any building, shall be hereafter erected to exceed either eight (8) stories or seventy-five (75) feet but not less than five (5) stories.

MODIFICATION OF HEIGHT LIMIT IN "RA6-15" DISTRICTS: By site plan approval as specified in the "RA4.8" district, dwellings may be increased to a height not to exceed either twelve (12) stories or one hundred twenty-five (125) feet.

C. AREA REQUIREMENTS:

1. LOT AREA: Same as specified for "R2-7" Districts, provided that for apartment houses every lot

shall have a minimum average width of seventy-five feet and a minimum area of seventy-five hundred square feet. The minimum lot area per dwelling unit for apartment houses, including resident employees' dwelling units, shall be as follows:

*Specifications for convenience service area now found in Section 1, Definitions.

Apartment Type	No. of Rooms	Lot Area Required Per Dwelling Unit
1	1	600 Sq. Ft.
2	2	900 Sq. Ft.
3	3	1200 Sq. Ft.
4	4 or more	1500 Sq. Ft.

The apartment type is determined by the number of rooms in each living unit, as shown in the table above. Rooms containing bath and/or kitchen facilities are not included in the room count used in the apartment type determination.

Any floor space exceeding forty square feet enclosed by partitions, or walls having a door or other opening for access, shall be deemed to be a room. The use of all rooms shall be clearly defined on the plans submitted with the application for a building permit.

(end of Section 14)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-786

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA,
Petitioner,

v.

MARY ROSE GREENE GOD, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

JURISDICTION

Respondent submits this Court lacks jurisdiction to review the subject decisions of the Supreme Court of Virginia under Title 28, United States Code, Section 1257(3) in that there was no federal constitutional issue raised in the Courts below, nor is there any controlling federal question involved in this case.

QUESTIONS PRESENTED

1. Whether the decision of the Supreme Court of Virginia was grounded in the Virginia Constitution and in Virginia Statutes.

2. Whether the federal question had been previously raised on a decision which rested on adequate and independent state grounds.

3. Whether the decision turned on its own particular facts and circumstances and thus presented no question of general importance sufficient to be worthy of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

Respondents respectfully submit that the Fourteenth Amendment to the United States Constitution was not involved in the decision of the court below. That court's decision was, and this Court's review should be, limited to:

Va. Const., Art. I, § 1, Appendix *infra* at 1a,
Va. Const., Art. I, § 8, Appendix *infra* at 1a-2a,
Va. Const., Art. I, § 11, Appendix *infra* at 2a,
Va. Code Ann., § 15.1-486, Appendix *infra* at 2a-3a,
Va. Code Ann., § 15.1-488, Appendix *infra* at 3a;
Va. Code Ann., § 15.1-489, Appendix *infra* at 3a-4a,
Va. Code Ann., § 15.1-510, Appendix *infra* at 4a.

STATEMENT OF THE CASE

The subject property is part of an irregularly shaped, but generally rectangular, block. The comprehensive zoning ordinance adopted by the County Board in 1950 drew a line through this block placing the major portion of the block in the R-6 residential category with a minor portion along 21st as part of the contiguous apartment zoning category, RA6-15. Thereafter, as the development of the area actually began, the County Board changed the character of the

block by a series of apartment zoning approvals, marching in sequence westward down the block. (See Exhibit C-14 and the successive overlays) The use of the remaining portion of the block, also as apartments, became reasonably predictable and use of the subject lot for a single family house, because of the surrounding circumstances, was no longer feasible. (Court's Memorandum, App. 5a)

At the time of the hearing before the Arlington County Board, when the subject rezoning application was denied, the County Land Use Plan in existence at that time had placed the subject property in an "undetermined" category.

The North Highland Neighborhood Conservation Plan, a plan devised by the neighborhood citizens association, through a quasi-official governmental arrangement, and relied upon in part by the County Board contained an error of fact in regard to the existing use of a critical nearby land quadrant. The citizens association had shown a single family residence diagonally across from the subject property where actually there existed a four unit apartment house. (Court's Memorandum, App. 5a)

The rear of the subject land has the Fort Bennett Apartment buildings "peering down on it" across a narrow 40-foot lot. On one side are very old houses already zoned for RA6-15 and obviously soon to become apartments. On the other side is a frame house already 60 years old and itself facing the rear of other cottages along the narrow 21st street. To the front of the subject property are the rear yards of four residences, themselves facing Rolfe Street. Two of these four residences are already zoned for RA8-18, for a higher apartment use. A fifth property in this RA8-18

area has already been developed as a four unit apartment building diagonally in front of the subject land. The subject land is then virtually an "orphan" not suitable as R-6. (Court's Memorandum App. 5a)

The County Board of Arlington denied the application for rezoning. The Appellee then applied to the Court for a Declaratory Judgment and after a full trial the Court found that the action of the County Board had been arbitrary and capricious and entered Judgment for the Respondent.

The County Board of Arlington applied to the Supreme Court of Virginia for a Writ of Error, which was granted and a full hearing was had upon the County Board's Appeal. The trial Court's decision was affirmed in part, reversed in part, and remanded. (App. 1A). In so doing the Supreme Court of Virginia agreed with the trial Court that the County Board of Arlington's denial of the rezoning application was discriminatory as to the Respondent and therefore arbitrary and capricious.

SUMMARY OF ARGUMENT

I. The decisions of the Supreme Court of Virginia were grounded in the Virginia Constitution and in Virginia statutes. Both opinions hold the actions of the Board of Supervisors were "discriminatory," were "arbitrary and capricious," and bore "no reasonable or substantial relation to the public health, safety, morals, or general welfare."

State courts have developed a body of state constitutional law by which they review uses of state police power. Sometimes based on state due process clauses, sometimes on more general precepts of the

limits of the police power, these state standards exist independently of federal law.

Virginia, like the other states, has evolved state constitutional doctrines which its courts have used regularly to measure exercises of the police power generally and the zoning power specifically. In applying these standards, Virginia courts ask whether actions are "discriminatory," "arbitrary and capricious," or "unreasonable."

An opinion firmly grounded in state law raises no question of federal law appropriate for review in this Court.

II. No federal question has been previously raised in order to give the Court jurisdiction to review the Judgment on Writ of Certiorari. The decision of the Supreme Court of Virginia rests on adequate and independent state grounds.

III. Even assuming, arguendo, the decisions below implicated federal constitutional standards, this case is tied to its peculiar facts and circumstances. As such, it is not worthy of certiorari. The case is bound up in the particular circumstances of Arlington County and can be of little help in guiding courts in other states.

ARGUMENT

I. The Decision of the Supreme Court of Virginia was Grounded in the Virginia Constitution and in Virginia Statutes.

Certiorari does not lie in this case unless Petitioner can show, as required by 28 U.S.C. § 1257 (s), that the "validity of a State statute is drawn in question on the ground of its being repugnant to the [Federal]

Constitution . . ." If the decision rests on grounds of Virginia law, this Court lacks jurisdiction and the petition for writ of certiorari must be dismissed.

A reading of the Opinion in this case demonstrates that it was based upon Virginia law, both constitutional and statutory, and relied upon current decisions from the same Court. *Board of Supervisors of Fairfax County* v. *Allman,* 215 Va. 434, 211 S.E.2d 48 (1975).

It is of interest to note that the County Board of Arlington in its Petition for a Writ of Certiorari does not refer to the Allman case, although the Allman case involved the identical principles of law and identical decision by the Supreme Court of Virginia and a denial by this Court of a Petition for Writ of Certiorari where Fairfax County raised the same issues raised here. (The *Board of Supervisors of Fairfax County* v. *Allman, et al,* Supreme Court of the United States, No. 75-388.) The Opinion here was based upon Virginia law, both constitutional and statutory.

The operative paragraph of the *Allman* decision is short (211 S.E.2d at 55):

> Allman has overcome the presumption of legislative validity that attached to the action of the Board in reaffirming a RE-1 classification for his land. His evidence established a course of action by the Board that was inconsistent and discriminatory. A discriminatory action is an arbitrary and a capricious action, and bears no reasonable or substantial relation to the public health, safety, morals or general welfare. The reasonableness of the Board's action is not fairly debatable, and it will not be sustained.

Similar language appears in the instant case:

> "The landowner's evidence was sufficient to overcome the presumed legislative validity of the Board's action and to show that the denial was unreasonable. The Board, however, in its turn, failed to produce evidence sufficient to show that the denial was reasonable. The question, then, was not fairly debatable. See *City of Richmond* v. *Randall, supra,* 215 Va. 511, S.E.2d at 60. Under the circumstances of this case, the denial of the rezoning application was discriminatory and, therefore, arbitrary and capricious. See Board of *Supervisors of Fairfax County* v. *Allman,* supra, 215 Va. at 445, 211 S.E.2d at 55." (App. 2a)

The key to both decisions therefore is an understanding of what grounds, constitutional or otherwise, underlie the Virginia Court's language of "discrimination," of "arbitrary and capricious," of actions bearing "no reasonable or substantial relation to the public health, safety, morals, or general welfare."

Petitioner would have this Court read the Virginia decisions as resting on the Fourteenth Amendment. Petitioner argues that "discrimination" must mean Fourteenth Amendment equal protection and that, in fashioning its standards for review of Arlington County's exercise of its delegated police powers in this case, the Virginia Court was using Fourteenth Amendment due process. So to argue betrays a woeful misunderstanding of a vast body of state constitutional doctrine upon which state courts, both in Virginia and the states at large, have drawn to use due process and other clauses in state constitutions to strike down discriminatory acts by government. Petitioner's argument also ignores the extent to which Virginia zoning decisions, both those now before this

Court and other earlier ones, have turned heavily on state statutes—the enabling acts which confer powers on local governments and which Virginia's courts strictly construe in reviewing the exercise of those powers.

The Virginia decision in *Allman* and in this case, in declaring that "discriminatory" acts are arbitrary and capricious and hence not valid exercises of the police power, rest on a well-developed body of state constitutional law which, long before the existence of the Fourteenth Amendment, served as the basis for state courts to review governmental acts. Sometimes due process is couched in terms of requiring adherence to the "law of the land"—the language which appears in Article I, Section 8 of Virginia's Constitution[1]—and sometimes as "due process of law"—language appearing in Virginia's Article I, Section 11.[2] (Both the United States Supreme Court and the state courts have consistently understood "due process of law" and "law of the land" to be synonymous.)[3]

Due process of law in American jurisprudence embodies several fundamental principles:

(1) Due process of law has long connoted general application of the laws. As Daniel Webster said in his celebrated argument in the *Dartmouth College* case: "By the law of the land is most clearly intended the general law. . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities,

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[1] See Appendix, p. 1a *infra*.

[2] See Appendix, p. 2a *infra*.

[3] See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. (59 U.S.) 272, 276 (1856).

under the protection of the general rules which govern society."[4] State courts from early days applied this principle.[5]

(2) Due process of law has long operated as a restraint on the arbitrary or capricious exercise of power. As this Court said in *Dent* v. *West Virginia*, 129 U.S. 114, 124 (1889), "The great purpose of the requirement [of due process] is to exclude everything that is arbitrary and capricous in legislation affecting the rights of the citizen."[6]

(3) Due process of law has long been used to protect individuals, and their life, liberty, and property, against discriminatory acts of government. The leading commentator on Virginia's Constitution has observed, "Well before the term 'equal protection' became a familiar landmark in American jurisprudence, protection against governmental discrimination and insurance of the general application of the laws were accepted connotations of Anglo-American due process of law." A. E. Dick Howard, *Commentaries on the Constitution of Virginia* (1974), I, 229-30 [hereinafter *Howard's Commentaries*]. In its report to the General Assembly, Virginia's Commission on Constitutional Revision (three of whose members sit today on the Supreme Court of Virginia) noted that "due process of law has often been understood to prohibit invidious discrimination."[7]

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[4] *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. (17 U.S.) 518, 581 (1819).

[5] See, *e.g.*, *Vanzant* v. *Waddell*, 10 Tenn. 259, 270 (1829).

[6] See also 16 Am. Jur.2d, "Constitutional Law" § 550 at 946-47: due process of law and the equivalent phrase law of the land require that classification must not be arbitrary and capricious.

[7] *The Constitution of Virginia: Report of the Commission on Constitutional Revision* (1969), p. 96 [hereinafter *CCR Report*].

(4) Due process of law overlaps with equal protection of the laws. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954)—companion case to *Brown* v. *Board of Education*—struck down public school segregation in the District of Columbia. The Court in *Brown* relied on equal protection, but in *Bolling* it rested on the due process clause of the Fifth Amendment. Chief Justice Warren noted that "as this Court has recognized, discrimination may be so unjustified as to be violative of due process." 347 U.S. at 499.

All of these traditional bases of due process of law —general application of the laws, restraint on arbitrary or capricious acts, protection against discrimination, and ensuring equal treatment—are reflected in the Virginia Court's decisions in *Allman* and in the instant case. Clearly there is no valid reason to suppose that that opinion was grounded in the federal equal protection clause. Petitioner's effort to prove otherwise rests on the sheerest speculation.

Moreover, the Virginia opinions in *Allman* and in this case bear no resemblance to federal standards of due process. They belong instead to the tradition, a well established one, that state courts reviewing exercises of state police power use standards having a basis independent of the Federal Constitution. The source of these standards includes but is not limited to due process of law. This Court has recognized this independent body of state law, observing, for example, in *Minnesota* v. *National Tea Co.,* 209 U.S. 551, 556-57 (1940), that the New York Court of Appeals "has ruled that its own conception of due process governs, though the same phrase in the federal constitution may have been given different scope by decisions of this Court."

With the withdrawal of the United States Supreme Court from reviewing state economic measures, "state constitutional law in some aspects [has become] the primary reliance and battleground for interests pressing for vindication."[8] The result has been the persistence of substantive due process and related concepts among the states—a willingness of courts, using doctrines drawn from state constitutional law, to take a closer look at applications of the police power than a federal court would be entitled to do under the Federal Constitution.

> Therefore, it is not surprising that just as the doctrine of substantive due process was finding expression in the states *before* 1890, so also the principle should continue to enjoy a vigorous life in some states *after* it has fallen into disuse on the national level. . . . In more recent years, state supreme courts have relied solely upon their own state constitutions.[9]

What we call "substantive due process" does not always spring from a due process clause as such (although frequently, of course, it does). Limitations on legislative power arise from clauses guaranteeing natural rights,[10] guarantees of "due course of law,"[11] or

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[8] Paul A. Freund, "Foreword," in *Howard's Commentaries*, p. viii.

[9] Monrad G. Paulsen, "The Persistence of Substantive Due Process in the States," 34 *Minn. L. Rev.* 91, 93, 98 (1950). See also John A. C. Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 *Nw. U. L. Rev.* 13, 226 (1958). Substantive due process is generally traced back to *Wynhamer* v. *People*, 13 N.Y. 378 (1856). See generally Edward S. Corwin, "The Doctrine of Due Process of Law Before the Civil War," 24 *Harv. L. Rev.* 366 (1911).

[10] *E.g.*, Va. Const., Art. I, § 1.

[11] *E.g.*, Ind. Const., Art. I, § 12.

from due process or "law of the land" provisions,[12] among others. A state constitution may contain more than one such clause; an example is the Virginia Constitution.[13] Whatever the language, such provisions have the common attribute of placing unspecified general limits on exercises of the power—limits that are expressed in terms of "discrimination," or "arbitrary and capricious," or like language.

The United States Supreme Court, especially since decisions like *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), and *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), has taken a largely "hands off" attitude to state exercise of the police power in the economic sphere. The Court will, of course, have reason to intervene if that police power is used to infringe federally protected rights (*e.g.*, that private property not be taken without compensation). But where and how to circumscribe the police power is otherwise a matter for the states and their courts.[14]

Even more than many states, Virginia is notable for the vitality of its tendency to look to its own constitu-

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[12] *E.g.*, Minn. Const., Art. I, § 2.

[13] See Va. Const., Art. I, § 1 (natural rights), Art. I, § 11 (due process).

[14] State courts consciously have in mind the vindication of values which a federal court faithful to the teachings of *Ferguson* has no place applying. State courts, using due process or other standards, have limited state police power in the name, for example, of the right to the "fruits of one's own industry," *State ex rel. Whetsel* v. *Wood*, 207 Okla. 193, 196, 248 P.2d 612 (1952) (invalidating statute regulating watchmakers), and a belief in "full and free competition," *Union Carbide & Carbon Corp.* v. *White River Distributors*, 224 Ark. 558, 275 S.W.2d 455, 458 (1955) (striking down "fair trade" law).

tional doctrines and the rights of the individual. In its 1969 report to the General Assembly, the Commission on Constitutional Revision—whose chairman wrote the *Allman* opinion now before this Court—admonished that, although most of the Virginia Bill of Rights provisions have a parallel in the Federal Bill of Rights, there is "no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians."[15]

Limitations on the police power. Especially relevant to the present case is the persistence in Virginia of judicial willingness to give closer scrutiny to the exercise of the state police power, as a matter of state constitutional doctrine, than would be appropriate for a federal court applying federal constitutional standards.

A leading Virginia case on the limits of the police power, *Young* v. *Commonwealth*, 101 Va. 853, 45 S.E. 327, 331 (1903), invalidated the conviction of a merchant who had given trading stamps in violation of state law. After a lengthy analysis of the meaning of "liberty" in the context of one's right to pursue a living, the Court ruled that the legislature had acted "arbitrarily" in enacting a statute not "reasonably necessary" to the legislature's purpose. The Court rested its decision on Article I, Section 8 of the Virginia Constitution; it expressly declined to address an equal protection claim.

Since *Young*, standards of "arbitrary and capricious" or "arbitrary and unreasonable"—standards used in the instant case—have been regularly applied

[15] *CCR Report*, p. 86.

by the Virginia Court in delineating the scope of the police power. In another leading case, *Moore* v. *Sutton*, 185 Va. 481, 39 S.E.2d 348 (1946), the Court used this approach in striking down a statute regulating the practice of photography. The justices could not see public health, safety, morals, or other interest sufficiently affected by the practice of photography as to justify the legislation.

In applying "arbitrariness" and "reasonableness" standards, the Virginia Court has explicitly recognized that by this state law route it may invalidate exercises of the police power which might be upheld were the only question one of Fourteenth Amendment standards applied by the United States Supreme Court. In *Moore* v. *Sutton, supra,* striking down a statute regulating the practice of photography, the court recognized that a contrary result would be reached were the standard a federal one (citing *Nebbia* v. *New York,* 291 U.S. 502 (1934)), but it rested the result on Article I, Section 1 of the Virginia Constitution—a mandate "so vital to the welfare of a free and untrammeled people." [16]

The standards used by the Virginia court in this case—finding the Board's actions to have been discriminatory and hence arbitrary and capricious—thus have their source in a long line of Virginia cases measuring exercises of the police power against the requirements of Virginia's Constitution, especially Article I, Sections 1, 8, and 11.

Zoning cases. In zoning cases specifically, as in police power cases generally, the Supreme Court of Vir-

[16] 39 S.E.2d at 351, 352.

ginia has repeatedly used Virginia standards of "arbitrary," "capricious," "unreasonable," and like language quite independently of federal constitutional measures. In *Board of Supervisors* v. *Carper,* 200 Va. 653, 107 S.E.2d 390 (1959), the court found that the effect of Fairfax County's Freehill Ordinance was to prevent people of modest means from living in the western two-thirds of the County. Declaring that the County may not "arbitrarily or capriciously" deprive one of the legitimate use of his property, the court found the amendment to be "unreasonable and arbitrary, [bearing] no relation to the health, safety, morals or general welfare." The court cited no specific state or federal constitutional provisions. In another case, *Boggs* v. *Board of Supervisors,* 211 Va. 488, 178 S.E.2d 508, 510-11 (1971), the court held that precluding a landowner of all beneficial use of his property was "unreasonable and confiscatory, and therefore unconstitutional." Here again no state or federal constitutional provisions were cited.

When the Supreme Court of Virginia intends to rest a decision on Fourteenth Amendment due process or equal protection grounds, it has only to say so. There are ample decisions in which it has done just that.[17] In light of those decisions, it strains a point to try, as Petitioner does here, to extract a federal constitutional ground from a decision whose language is so completely in line with the general run of Virginia decisions testing exercises of the police power against Vir-

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[17] See, *e.g., Archer* v. *Mayes,* 213 Va. 633, 194 S.E.2d 707 (1973); *Standard Drug Co.* v. *General Electric Co.,* 202 Va. 367, 117 S.E.2d 289 (1960); *Weber City Sanitation Comm'n.* v. *Craft,* 196 Va. 1140, 87 S.E.2d 153 (1955); *Williams* v. *City of Richmond,* 177 Va. 477, 14 S.E.2d 287 (1941).

ginia standards of "discrimination," "arbitrary and capricious," and "unreasonable."

II. No Federal Question has been Previously Raised and the Decision Rests on Adequate and Independent State Grounds.

Rule 23 1(f) Supreme Court of the United States Rules requires that the Petitioner specify the stage in the proceedings in the Court of first instance and in the Appellate Court at which point a federal question sought to be reviewed was raised. Petitioner has not done this and indeed he can not because no federal question was raised, it apparently having been considered to be an issue for the first time by the County Board of Arlington when they determined to apply to this Court.

Their argument is a strange one in that they appear to claim that the Circuit Court of Arlington and the Supreme Court of Virginia have denied equal protection of the law to the unspecified residents of the area in which the subject land is located. Their argument is if the County Board grants a change of zoning to a property owner, it is denying equal protection of the laws to all other property owners in the neighborhood who may or may not have wished the zoning change to be put into effect. They argue that residents of the County may not ". . . rely on its intention to maintain a family residential district as a basis for imposing single-family use restrictions." (Page 21, Petition for Writ of Certiorari in this case.) This is a patently fatuous argument. The County Board of Arlington had declared the subject block to be a residential area and so zoned it. It then ignored its own original zoning and proceeded, step by step, from North Pierce Street westward to change the R-6 zone to RA 6-15, lot by lot

changing all of the block save and except the two subject lots and two other very small lots.

At the time of the application by Mrs. God for a change of zoning, the Board had changed its political philosophy and refused to apply those same standards previously applied by its predecessors and justified its refusal for reasons or lack of reasons which the trial Court found to have been arbitrary and capricious. It is no more complicated than that.

The decision in this case is grounded in Virginia statutes in two ways. In the first place, the court's conclusion that the Board's action was discriminatory, hence arbitrary and capricious, and thus bore no reasonable or substantial relation to the public health, safety, morals, or general welfare directly parallels the Virginia statutes under which counties exercise the police power generally and the zoning power specifically. Secondly, the decision rest squarely on an earlier Virginia decision, *Board of Supervisors* v. *Carper,* 200 Va. 653, 107 S.E.2d 390 (1959), which in turn had found discrimination in violation of a Virginia statute requiring uniformity in zoning regulations.

"This Court from the time of its foundation had adhered to the principle that it will not review judgments of state courts that rests on adequate and independent state grounds." *Herb* v. *Pitcairn,* 324 U.S. 117, 125 (1945). The burden is on Petitioner seeking a writ of certiorari from this Court to make an affirmative showing from the record

> not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of

> the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. *New York ex rel. Pierson,* 293 U.S. 52, 54 (1934). The basis for this rule lies in the limits of the Court's jurisdiction—that the Court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *Herb* v. *Pitcairn,* 324 U.S. at 125-26.

III. Even Assuming Federal Grounds of Decision Are Involved, the Decision Involved No Question of Sufficiently General Importance Worthy of Certiorari.

Zoning and land use are matters peculiarly within the state interest and concern. Indeed the authority to regulate and control the individual property owner's use of land resides in the local jurisdiction under the police power pursuant to a delegation of this authority by the state legislature.[18] If the present system of delegating and defining the scope of the zoning power does not effectively serve the interest of a particular state in furthering the general welfare of the locality, region, or entire state,

> It is the state legislature's and not the federal courts' role to intervene and adjust the system . . . [T]he federal court is not a super zoning board . . . *Construction Industry Association of Sonoma County* v. *Petaluma,* Slip Opinion at 17, Record No. 74-2100 (9th Cir., August 13, 1975).

the proper forum for resolving land use questions and policies is at the state and/or local level. A dramatic

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[18] See Va. Code Ann. §§ 15.1-486, -489 in Appendix, *infra,* at pp. 2a, 3a.

intrusion of the kind sought by Petitioner into an area of traditional state concern is not warranted. Cf. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 40 (1973).

The Board also argues that the Virginia court's decision invalidating the Board's actions in this case denies other citizens of Arlington County due process of law by impairing the Board's legislative functions. Aside from ignoring the court's finding that the Board's land use policies in fact discriminate against and exclude "other citizens," such an argument asks this Court to review a state court's decisions about the reach and amenability to judicial scrutiny of state police power, a matter peculiarly governed by state law. Decisions as to what functions should be performed by state courts and what by legislative bodies, in short questions of separation of powers in state and local governments, are for the states to decide. Cf. *Sweezy* v. *New Hampshire,* 354 U.S. 234, 255 (1957).

Zoning issues, especially the reasonableness of ad hoc decisions on particular rezoning applications, typically are determined on the basis of the facts and circumstances in each case. *Euclid* v. *Ambler Realty Co., supra,* 272 U.S. at 387-88. The precedential value of any particular case is therefore inherently limited even within its own jurisdiction, and its ability to exert influence across state lines is even more tentative.

The facts and circumstances in this case involving two small lots greatly limits their precedential value. There are certainly no new principles of law enunciated in this case.

The relevant equal protection and due process standards are easily stated. Equal protection requires that the classification "must be reasonable, not arbitrary, and must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). Due process, "as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object to be attained." *Nebbie* v. *New York, supra,* 291 U.S. at 525.

Court called upon to decide the constitutionality of zoning actions as they impinge upon private property rights inevitably are being asked to balance, on the facts of the particular case, the private and public interests at stake—the purpose of the regulation, its economic impact upon a property owner, the fairness of classification, etc. Rezoning applications in particular require ad hoc decisions, no two of which are just alike.

Both equal protection and due process are ultimately concerned that arbitrary or invidious distinctions are not made among those who, in light of a zoning ordinance's legitimate purposes, ought not to be treated differently. The important point, for the purposes of certiorari, is that it would be an unfortunate use of this Court's limited time to sift the facts of a particular rezoning case to see whether a state court drew permissible inferences of discrimination or arbitrariness which would support a conclusion that equal protection or due process was denied. This case

raises no question of general application about zoning power, and is not worthy of certiorari.

CONCLUSION

In essence this case is an effort to read into a state court opinion a federal ground which was not previously raised. It is an attempt to have this Court displace a state court's application of state constitutional and statutory standards to a locality's exercise of powers delegated to it by state law. It is an attempt to have this Court undertake to review factual findings turning on the circumstances of a particular Virginia county. How one state chooses, under its constitution and statutes, to measure the police powers of its own political subdivisions is clearly inappropriate for Supreme Court review.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

Constitution of Virginia

Article I.

Bill of Rights

A DECLARATION OF RIGHTS made by the good people of Virginia in the exercise of their sovereign powers, which rights do pertain to them and their posterity, as the basis and foundation of government.

§ 1. Equality and rights of men—That all men are by nature equally free and independent and have certain inherent rights, of which when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

§ 8. Criminal prosecutions.—That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witness, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopary for the same offense.

Laws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class.

In criminal cases, the accused may plead guilty. If the accused plead not guilty, he may, with his consent and the concurrence of the Commonwealth's Attorney and of the court entered of record, be tried by a smaller number of jurors, or waive a jury. In case of such waiver or plea of guilty, the court shall try the case.

The provisions of this section shall be self-executing.

§ 11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.—That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil causes in courts of record to not less than five.

Virginia Code Title 15.1*

§ 15.1-486. Zoning ordinances generally; jurisdiction of counties and municipalities respectively.—That governing body of any county or municipality may, by ordinance,

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* Code sections are here reproduced as they appeared at the time of both trial court and Supreme Court of Virginia decisions in *Allman* and *Williams*. Sections 15.1-486 and 15.1-489 have since been amended, effective July 1, 1975, in a manner not pertinent to the subject decisions.

divide the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and area as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agricultural, commercial, industrial, residential, flood plane and other specific uses;

(b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;

(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses; and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used;

(d) The excavation or mining of soil or other natural resources; and

For the purpose of zoning, the governing body of a county shall have jurisdiction over all the unincorporated territory in the county, and the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality.

§ 15.1-488. Regulations to be uniform.—All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts.

§ 15.1-489. Purpose of zoning ordinances.—Zoning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of further accomplishing the objectives of § 15.1-427. To these ends, such ordinances shall be designed (1) to provide for adequate light, air, convenience of access, and safety

from fire, flood and other dangers; (2) to reduce or prevent congestion in the public streets; (3) to facilitate the creation of a convenient, attractive and harmonious community; (4) to expedite the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements; (5) to protect against destruction of or encroachment upon historic areas; (6) to protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health or property from fire, flood, panic or other dangers; and (7) to encourage economic development activities that provide desirable employment and enlarge the tax base.

§ 15.1-510. General powers of counties.—Any county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this State. Such power shall include, but shall not be limited to, the adoption of quarantine regulations affecting both persons and animals, the adoption of necessary regulations to prevent the spread of contagious diseases among persons or animals and the adoption of regulations for the prevention of the pollution of water in the county whereby it is rendered dangerous to the health or lives of persons residing in the county.